United Nations A/HRC/29/NGO/106

General Assembly

Distr.: General
10 June 2015

English only

Human Rights Council
Twenty-ninth session
Agenda item 2
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Written statement* submitted by the Article 19 - International Centre Against Censorship, a non-governmental organization on the roster

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-09418 (E)
1509418

Please recycle

Promoting freedom of expression, association and assembly to combat violence and discrimination on grounds of sexual orientation or gender identity

ARTICLE 19 welcomes the updated report of the High Commissioner for Human Rights, drawing attention to good practices for overcoming violence and discrimination on the basis of sexual orientation and gender identity.[1] The updated report demonstrates that freedom of expression, association and peaceful assembly are instrumental in overcoming violence and discrimination against people on the basis of their sexual orientation or gender identity.

This written statement highlights key cases and trends that ARTICLE 19 submitted to the High Commissioner for Human Rights to assist his preparation of the updated report, indicating good practice examples to protect the expression, association and assembly rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people:

Gender identity and expression
In several jurisdictions, the scope of the right to freedom of expression has been interpreted to include individuals' freedom to outwardly express their gender identity.

In November 2014, the Putrajaya Court of Appeal in **Malaysia** ruled a law criminalising any male person who "wears women's attire" as violating, *inter alia*, the right to freedom of expression as enshrined in the Constitution of Malaysia.[2] In April 2014, the Supreme Court of **India** ruled that the Constitution protects "one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, actions or behaviour or any other form."[3] In the **United States of America**, the First Amendment guarantee for freedom of expression have also be applied to challenge the application to transgender children of gender-specific dress codes in schools.[4]

Repeal of discriminatory laws
Good practices in promoting the freedom of expression rights of LGBTI people include the repeal of laws that expressly discriminate against persons on the basis of their sexual orientation or gender identity.

In June 2013, the **Venice Commission** issued its opinion on legislation prohibiting so-called "homosexual propaganda", finding that such prohibitions are incompatible with the European Convention on Human Rights and international human rights standards.[5] A number of these laws remain in force in Council of Europe Member States, notably in **Russia**, where legislation has been used to target newspapers,[6] and threatens the work of LGBT organisations and human rights defenders. However, in October 2013, the Parliament of **Moldova** repealed amendments to the Code of Administrative Offences that banned the promotion of non-traditional relationships.

Rejection of discriminatory draft laws
Several Parliaments have resisted initiatives to institute bans on "homosexual propaganda", in spite of popular or vocal support for them.

---

[1] A/HRC/29/23, Update of report A/HRC/19/41 (on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity) - Report of the United Nations High Commissioner for Human Rights
[2] Justice prevails for transwomen in Negeri Sembilan after years of violence and discrimination, Justice For Sisters, 10 November 2014
[3] Ibid, at para. 62
[4] *Doe* v. *Yunits*, MA Sup. Ct. 2000
[5] Opinion on the issue of the prohibition of so-called 'propaganda of homosexuality' in the light of recent legislation in some member states of the Council of Europe, Venice Commission Opinion 707/2012, 18 June 2013, at paras 78 – 83
[6] Russia: Newspaper targeted under homosexual propaganda ban, 13 November 2013

In August 2013, **Armenian** legislators withdrew proposed amendments to the administrative offences law to ban "promoting" "non-traditional sexual relationships".[7] Two similar initiatives in **Ukraine** have not been adopted,[8] and in 2012 the **Hungarian** Parliament rejected two proposed discriminatory amendments to the Constitution.[9] While the shelving of such initiatives by domestic parliaments should be considered positive, this should be distinguished from good practice. The tabling of these laws, even if ultimately unsuccessful, is often accompanied by homophobic and transphobic rhetoric by politicians and the media.

Hate speech

Developments at the international and regional levels support a trend among States to recognise homophobic and transphobic hate speech as being as serious as racial, xenophobic or anti-Semitic hate speech.[10]

In 2013, ARTICLE 19 set out a two-pronged response to "hate speech" targeting LGBT people,[11] combining comprehensive positive policy measures to tackle the root causes of prejudice against LGBTI people with a coherent legal framework for prohibiting the advocacy of hatred against people on the basis of sexual orientation or gender identity that constitutes incitement to discrimination, hostility, or violence.

ARTICLE 19 maintains that States should primarily employ a range of positive measures for tackling prejudice and discrimination, with prohibitions considered a last resort.[12] In several jurisdictions, the scope of the right to freedom of expression has been found to be inclusive of robust and critical counter-speech to incidents of hate speech or other forms of discrimination. For example, in April 2014 the **European Court of Human Rights** upheld the right to robustly contest homophobia in public discourse.[13]

Media representation of LGBTI people

ARTICLE 19 has long argued that mass media have an ethical responsibility to promote equality and non-discrimination.[14] ARTICLE 19 has emphasised concrete steps that mass media entities can take in respect of their own constitutions to counter violence and discrimination against minorities, which would also apply to LGBTI people.[15]

There are many examples where press self-regulatory bodies[16] and national journalists' unions have adopted voluntary codes of conduct guidelines on covering LGBTI issues.[17] In other cases, civil society organisations have issued guidelines to media on accurate and appropriate terminology and approaches for covering issues about or affecting LGBTI people,[18] as well as guidance for journalists on challenging discriminatory discourse.[19] There are also positive examples of media collaborating with civil society to shine a spotlight in the media on neglected experiences of LGBTI people.[20]

Anonymous communication

---

[7] ILGA - International Lesbian Gay Bisexual Trans and Intersex Associations, *State-sponsored homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love 2014*, at page 19

[8] "Traditional Values? Attempts to censor sexuality. Homosexual propaganda bans, freedom of expression and equality", *op. cit.*, at pages 29 to 32

[9] *Ibid.*

[10] See, for example: the decision of the European Court of Human Rights in *Vejdeland and Others v. Sweden*, Application No. 1813/07, 9 February 2012; and Council of Europe Recommendation CM/Rec (2010) 5

[11] *Op. Cit.*, at page 22

[12] Illustrative examples of "good practice" in this regard are provided in detail in Responding to Hate Speech against LGBTI people, ARTICLE 19, October 2013

[13] European Court of Human Rights, *Mladina D.D. Ljubljana* v. *Slovenia*, Application No. 20981/10, 17 April 2014

[14] Responding to Hate Speech against LGBTI people, *op. cit.*, at page 23

[15] *Ibid.* See also: *Camden Principles, op.cit.*;

[16] See, for example: Editors' Code of Practice, Independent Press Standards Organisation, (United Kingdom), at Clause 12 "Discrimination"

[17] National Union of Journalists Guidelines on LGBT reporting, United Kingdom, 2 September 2014

[18] See, e.g. the Media Style Guide by Trans Media Watch, and other resources

[19] See, e.g. In Focus: Faith, LGBT People, & the Midterm Elections, GLAAD & the Human Rights Campaign, USA

[20] See, e.g. Stories of Our Lives" Sheds Light on Kenya's Gay Community, 6 September 2014

It has been recognised that privacy is an important condition for enabling free expression between like-minded people on the Internet.[21] This is especially important in countries with repressive legal or social environments for LGBTI people. National courts have upheld the importance of anonymity to the exercise of the right to freedom of expression, particularly for minorities and those with dissenting viewpoints.[22]

Robust legal protections for the right to privacy online, including the protection of anonymity online, should be considered good practice. In part, this is best achieved through an absence of regulation, for example, by governments not adopting requirements for the registration of Internet users, or for the activation of SIM cards.[23] Other good practices include requiring that investigative authorities obtain prior judicial authorisation in order to obtain basic subscriber information of Internet users from Internet Service Providers.[24]

Right to freedom of peaceful assembly

Since report 19/41, a number of countries including **Lesotho**[25] and **Cyprus**[26] have celebrated their first LGBTI pride events. In countries with recurring annual events, such as **Montenegro**, a marked reduction in violence has been observed, in part due to robust support given to such events by public officials and politicians from across different parties.[27] In **Serbia**, authorities in 2014 facilitated a pride parade where no violence was recorded, despite such events being banned in the country for the three previous years due to public safety concerns.[28] In some instances, pride events have proceeded following domestic court rulings overturning administrative decisions to block them.[29] In Europe, where States have failed to facilitate such assemblies, the **European Court of Human Rights** has consistently found violations of Article 11 of the Convention.[30]

Right to freedom of association

Obstacles to formation of associations that seek to protect the rights of LGBTI people are a particular concern in countries where attaining lawful status or legal personality for associations requires mandatory registration. In this regard, not requiring mandatory registration for associations, such as in **Sweden**, should be considered good practice.[31]

In **Botswana**, the High Court declared that the denial of registration of LEGABIBO (Lesbians, Gays and Bisexuals of Botswana) violated the applicants' rights to freedom of expression and freedom of peaceful assembly and of association, despite provisions criminalising homosexuality in the Penal Code.[32] In May 2015, the High Court of **Kenya** held that the NGO Board's refusal to register the National Gay and Lesbian Human Rights Commission breached the applicant's right to freedom of association.[33] The Court stressed that moral or religious beliefs cannot be a basis for limiting fundamental rights.[34]

In April 2010, the Supreme Court of the **Philippines** in *Ang Ladlad v. Commission on Elections* addressed the connection between the rights to freedom of association, expression and public participation. In overturning the decision of the Commission on Elections to deny LGBTI organisation *Ang Ladlad* registration as a political organisation, the

---

[21] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 17 April 2013, A/HRC/23/40.

[22] Supreme Court of the United States, *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 344, 357 (1995)

[23] China Is Requiring People to Register Real Names for Some Internet Services, Wall Street Journal, 4 February 2015

[24] See, for example, the recent ruling of the Supreme Court of Canada in *R. v. Spencer*, 2014 SCC 43

[25] Small march is a big step for LGBTI in Lesotho, Open Society Initiative for Southern Africa, 31 May 2013

[26] Thousands march in Cyprus' first gay pride parade, seeking equal rights, Reuters, 31 May 2015

[27] Montenegro pride parade is a step toward human rights, SE Times, 26 November 2014

[28] Serbia Gay Pride march returns after four years, BBC News, 28 September 2014

[29] "Mayor confirmed that Vilnius Municipality will execute court order", Lithuania Tribune, 23 July 2013

[30] *Baczkowski and Others v. Poland*, Application No 1543/06, 3 May 2007; *Alekseyev v. Russia*, Application Nos. 4916/07, 25924/08, 14599/09, 21 October 2010; *Genderdoc-M v. Moldova*, Application No. 9106/06, 12 June 2012

[31] Joint Guidelines on Freedom of Association, Venice Commission and OSCE ODIHR, 17 December 2014

[32] Register LEGABIBO, Judge Rannowane orders Botswana Government, 15 November 2014

[33] *Eric Gitari v NGO Board and four others* [2015], Petition 440 of 2013.

[34] *Ibid.* at para. 121-122

Supreme Court emphasised that the Constitutional protections for freedom of expression limited the power of the majority to "ride roughshod over dissenting minorities."

Recommendations

In light of the adoption of Human Rights Council Resolution 27/32 and the update to report A/HRC/19/41, ARTICLE 19 encourages the Human Rights Council to:

- Institutionalise systematic attention to the human rights of LGBTI people, including their rights to freedom of expression, association, and assembly;
- Ensure constant monitoring on and regular reporting of the violation of the human rights of LGBTI people.

In particular, ARTICLE 19 urges Member States to:

- Repeal laws that limit the rights of transgender people to freely express their gender identity, including through choice of dress, speech or mannerism, and ensure their ability to safely and fully participate in public life.
- Repeal laws that discriminate against persons on the basis of their sexual orientation or gender identity, in particular so-called 'homosexual propaganda' bans;
- Enact positive and comprehensive legal and policy measures to combat hate speech against LGBTI people, guided by the framework put forward in the Rabat Plan of Action;
- Protect the right to privacy online, including the protection of anonymity online;
- Facilitate the right to freedom of assembly and protect the right to freedom of association for LGBTI people without discrimination.